No. 76-1587

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL POWER COMMISSION, PETITIONER

v.

SOUTHLAND ROYALTY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 543 F.2d 1134. The initial opinion and order (No. 737) of the Federal Power

[1] "Pet. App." references are to the appendix to the petition for certiorari filed by the Federal Power Commision in No. 76-1587. "A." refers to the Appendix in this Court.

Commission (A. 598-611) and its opinion and order (No. 737-A) denying rehearing (A. 708-718) are reported at 54 FPC 145 and 54 FPC 917, respectively.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1976 (Pet. App. 12a-13a). On March 3, 1977, Mr. Justice Powell extended the Commission's time for filing a petition for a writ of certiorari to and including May 12, 1977, and the petition was filed on that date. On June 27, 1977, the Court granted the petition in this case, No. 76-1587, and in two related cases: *California, et al.* v. *Southland Royalty Company, et al.*, No. 76-1114, and *El Paso Natural Gas Company* v. *Southland Royalty Company, et al.*, No. 76-1133, and consolidated the three cases (A. 746). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the lessors of land and their successors in interest, at the expiration of a 50-year lease, must obtain abandonment authorization from the Federal Power Commission under Section 7(b) of the Natural Gas Act before they may withdraw gas from interstate commerce after the lessee, during the lease term, had sold gas from the leaseholds in interstate commerce and had obtained from the Commission certificates of public convenience and necessity of unlimited duration authorizing that service.

STATUTES INVOLVED

Sections 1(b), 7(b), (c), and (e) of the Natural Gas Act, 52 Stat. 821, 824-825, as amended, 15 U.S.C. 717(b), 717f(b), (c), and (e), are set forth as Appendix A, *infra*, pp. 1a-3a.

STATEMENT

In this case the Federal Power Commission held that, once a natural gas producer has made natural gas sales for resale in interstate commerce pursuant to a Commission certificate of unlimited duration, the reserves of natural gas underlying those sales may not be withdrawn from that service without Commission authorization, where the asserted basis for the withdrawal is the termination of the lease between the mineral interest owners and the natural gas producer. On review, the court of appeals held that, by virtue of local property law, the termination of the lease is a sufficient basis for the cessation of sales in interstate commerce and there is no need to obtain abandonment authorization from the Commission.

1. The Leases, Interstate Sales and Certificates.

On July 14, 1925, Gulf Oil Corporation (Gulf), then Gulf Production Company, executed an oil and gas lease with W. N. Waddell and others (the Waddell Lease), under which Gulf obtained the exclusive right to explore, produce and market all oil and gas from 45,771 acres of land in Crane County, Texas (A.

135-140). The lease provided that Gulf would also have "such other privileges as are reasonably requisite for the conduct of said operations" (A. 135), and that the lessor would receive a royalty based on the quantity of natural gas produced and the number of producing wells (A. 137). It further provided that the "lease shall not remain in force longer than fifty (50) years from this date * * *" (A. 136).

In 1951 and 1972, Gulf entered into contracts with El Paso Natural Gas Company (El Paso), an interstate pipeline company, for the sale of a quantity of "surplus residue gas"—that is, a portion of the end product of Gulf's processing of gas—from wells on the Waddell Lease and from other sources (A. 40-63, 87-101).[2]

After the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, Gulf applied for and obtained from the Commission certificates of public convenience and necessity of unlimited duration authorizing the service to El Paso. These were

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[2] Gulf operates a natural gas processing plant which, in essence, refines natural gas issuing from oil wells (called "casinghead gas," as distinguished from "gas-well gas") by removing certain elements. Gulf's sales contracts with El Paso define "residue gas" as "the gas which remains after casinghead gas has been processed," less the amounts used in the operation of the plant (A. 42, 88). The contracts define "surplus residue gas" as the residue gas remaining after the satisfaction of certain specified needs and obligations of Gulf (*ibid.*). Gulf's processing plant obtained casinghead gas from a number of sources, including wells on the Waddell Lease (A. 123).

issued on May 28, 1956 (A. 23-40) and August 7, 1973 (A. 102-116).

On July 14, 1975, the Waddell Lease expired [3] and title to the mineral estate reverted to the reversionary mineral interest owners.[4]

On August 7, 1925, Gulf entered into a similar 50-year fixed-term oil and gas lease with Goldsmith and others (the Goldsmith Lease) under which Gulf obtained exclusive mineral rights to some 19,840 acres in Ector County, Texas (A. 293-297).[5] Gulf sold gas from the Goldsmith Lease to Phillips Petroleum Company (Phillips), which processed the gas and sold it to El Paso at the outlet of Phillips' Goldsmith plant pursuant to certificates of public convenience and necessity granted by the Commission (16 FPC 1440). El Paso in turn transported the gas in interstate commerce for subsequent resale. The Goldsmith Lease expired on August 7, 1975, and title to the mineral estate reverted to the reversionary mineral interest owners.[6]

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[3] See *Gulf Oil Corporation* v. *Southland Royalty Company*, 496 S. W. 2d 547 (Tex. Sup. Ct.).

[4] Before the lease expired Southland Royalty Company (Southland) and more than 100 other companies and persons acquired fractional shares of the reversionary interest (see A. 149-165).

[5] On May 4, 1929, Texas, Inc. (Texaco), then the Texas Gas Company, acquired a one-fourth interest in the reversionary mineral estate of the Goldsmith Lease (A. 297).

[6] For the purposes of this case, the parties are agreed that there are no material differences between the Goldsmith and Waddell leases or between the obligations, if any, of the re-

2. The Proceeding Before The Commission.

In January 1975, El Paso petitioned the Commission to declare whether, when the Waddell Lease expired, the reversionary mineral interest owners (Southland *et al.*) could cease deliveries to El Paso and sell the gas in intrastate commerce,[7] without obtaining abandonment authorization from the Commission pursuant to Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b). In April 1975, Texaco petitioned for a similar declaration with respect to gas produced from the reserves covered by the Goldsmith Lease.[8] The reversionary mineral interest owners sought to sell the gas intrastate because of the substantial differential that has existed in recent years between the price of unregulated intrastate gas and that of regulated interstate gas.[9] Because of the simi-

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versionary mineral interest owners after the expiration of each lease to continue supplying gas to the interstate market. See Respondents' Br. in Opp., pp. 3-4, n. 10.

[7] Shortly before the end of the lease period, Southland contracted with Intratex Gas Company, an intrastate gas pipeline, for the sale of the gas remaining after expiration of the Waddell Lease (A. 600).

[8] See note 5, *supra*.

[9] See Pet. App. 1a. The court of appeals noted that "[w]hile this opinion was in preparation, the Federal Power Commission announced a dramatic increase in regulated natural gas prices which substantially eliminated this price gap" (Pet. App. 1a, n. 1). The statement is somewhat misleading. In June 1976 the Commission ordered a substantial increase in the regulated national interstate ra[illegible] but the application of that increase was limited to gas issuing from wells commenced

larity of the issues presented, the Commission consolidated the proceedings (A. 362). Because there were no factual issues, no evidentiary hearings were sought or held (*ibid.*).

On July 11, 1975, the Commission issued Opinion No. 737 (A. 598-611), holding that Gulf and Phillips had dedicated the gas underlying the respective leases to interstate commerce pursuant to unlimited certificates of public convenience and necessity and that the reversionary mineral interest owners could not withdraw the gas from interstate commerce without abandonment authorization under Section 7(b). The Commission reasoned that under decisions of this Court "the dedication involved is not the dedication of an individual party or producer, but the dedication of gas" (A. 605). Relying on the principle that once the service of supplying gas in interstate commerce from specific acreage has commenced, it may not be

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after January 1, 1973, and would not apply to gas produced from respondents' wells which were commenced before that date. See FPC Opinion No. 770 (issued July 27, 1976), affirmed *sub nom. American Public Gas Association* v. *Federal Power Commission*, C.A.D.C., No. 76-2000 (June 16, 1977), rehearing denied, August 17, 1977). Moreover, the rate increase approved for "new gas" has not eliminated a substantial disparity between that rate and currently prevailing intrastate prices.

The House of Representatives has recently passed a bill (H.R. 8444, 95th Cong., 1st Sess. (1977) which would extend federal price regulation to intrastate gas and require common rates for interstate and intrastate gas produced by wells commenced after April 20, 1977. That legislation is under consideration in the Senate. Again, that legislation would not affect the large bulk of gas that is currently being produced.

abandoned without Commission approval, the Commission stated (A. 606):

> [T]he duty to continue to serve is like an ancient covenant running with the land [quoting from *Hunt* v. *Federal Power Commission*, 306 F. 2d 334, 342 (C.A. 5), reversed on other grounds, 376 U.S. 515]. This does not mean that we are modifying the law of Texas as to the leasehold rights; we are however recognizing rights and duties that have been created by the Congress under the Natural Gas Act.[10]

The Commission concluded that both the reversionary mineral interest owners and Gulf were required to obtain permission from the Commission before abandoning interstate sales of gas from the reserves underlying the leases.[11]

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[10] The Commission distinguished its earlier decision relied on by respondents, *El Paso Natural Gas Co.* v. *Bass*, 48 FPC 1269, in which the lease gave the lessor an option, after the lessee recovered its drilling costs, to receive in lieu of royalty a one-half working interest in the gas produced. The lessee sold gas from its "properties" to El Paso, the lessor later exercised his option, and the Commission held that the lessor did not need Commission abandonment authority to sell gas from his one-half working interest to an intrastate pipeline. The Commission here declined to extend *Bass* to the facts of this case and expressly overruled its broader implications (A. 607, 712). The Commission has since overruled *Bass* altogether. *Phillips Petroleum Company*, FPC Opinion No. 750 (issued January 1, 1976).

[11] The Commission explained that requiring Gulf to obtain abandonment authority was not a "mere technical requirement," because "[w]e should have all the significant parties before us if the relations between the reversioners, lessees, processing plants, and El Paso are to be changed" (A. 608-609).

On petition for rehearing the Commission reaffirmed those findings and conclusions (A. 708-718) and made the additional observation that while the lessors and lessee may not have anticipated the enactment of the Natural Gas Act when they executed the leases in 1925, they did contemplate that Gulf would sell the gas from the leaseholds to outside parties (A. 712-713). The Commission noted that Gulf may even have had a duty under the leases and local law to sell the gas to interstate purchasers (who at that time constituted the principal market for natural gas), and that after the *Phillips* decision Gulf was the appropriate party to seek Commission certification for the interstate sales. The lessors could have intervened in the certification proceeding, but did not, and thus "apparently had no objection to interstate dedication, for they accepted royalties from such sales" (A. 713, n. 3).

3. The Court of Appeals Decision.

The court of appeals reversed the Commission's orders (Pet. App. 1a-11a). The court viewed the issue of interstate dedication as controlled by local law, noting that "[u]nder applicable Texas law, Gulf's rights were those of a tenant for a term of years; its interest was a limited one which terminated completely when title reverted to Southland at the expiration of a 50-year term" (Pet. App. 5a). Thus, "under well established concepts of property law, Gulf could not legally deal in or dedicate that portion of the gas which Southland might own upon termina-

tion of Gulf's estate" (Pet. App. 6a). The court concluded that by virtue of state property law the reversionary mineral owners were free to withdraw their gas from interstate commerce without Commission authorization.[12]

SUMMARY OF ARGUMENT

A. The decision of the court of appeals undermines the Commission's authority under the Natural Gas Act. In holding that the present owners of natural gas reserves may abandon without Commission authorization a "service" in gas based on those reserves, commenced by their lessee and certificated by the Commission, the court has released billions of critically needed cubic feet of gas from their interstate commitment and seriously threatened the Commission's mandate to assure "maintenance of adequate service in the public interest." [13] The decision is con-

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[12] Pending the final disposition of this case, the parties have entered into various agreements whereby the reversionary mineral owners are continuing to supply the gas in interstate commerce subject to the obligation of El Paso, in the event the decision below is sustained, to repay in kind gas delivered after termination of the leases. Pursuant to the parties' request, the Commission incorporated this conditional agreement in its order and made it clear that in the event the Commission's order was reversed on review, the deliveries of gas by the respondents *pendente lite* would not be deemed an interstate dedication of gas by them (A. 717-718).

[13] Section 7(c) of the Act, 52 Stat. 825. This language was later eliminated from the Act, without changing the declared purpose. *Atlantic Refining Co.* v. *Public Service Commission of New York (CATCO)*, 360 U.S. 378, 388 and n. 7.

trary to the fundamental premise of the Act that, once gas is dedicated to interstate commerce by the Commission's issuance of a certificate of public convenience and necessity, "there can be no withdrawal of that supply from continued interstate movement without Commission approval" (*Atlantic Refining Co.* v. *Public Service Commission of New York (CATCO)*, 360 U.S. 378, 389), regardless of intervening changes in property rights with respect to the gas and regardless of "technical concepts of local law." *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400.

B. The decision is also contrary to this Court's construction of the abandonment provision of the Transportation Act of 1920, on which Section 7(b) of the Natural Gas Act was modeled. Decisions of the Interstate Commerce Commission and this Court have long established that the Transportation Act of 1920 requires approval by the ICC before certificated interstate service under a terminated railroad lease can be abandoned. In that context it has been recognized that to make the Commission's jurisdiction over rail service coterminous with railroad leases would enable parties to thwart the national interest in continued interstate service by conducting their business through short-term lease arrangements. The decision below poses the same threat to the nation's vital interest in the interstate supply of natural gas.

C. Moreover, the court of appeals failed to recognize, as courts have recognized in the railroad context, that there is nothing unusual or inequitable in im-

posing on lessors the regulatory consequences of actions by their lessees that benefited the lessors and that were permitted and even required by the lease agreements.

ARGUMENT

When A Lessee Of Gas-Producing Property Has Obtained A Certificate Of Unlimited Duration For The Sale Of The Gas In Interstate Commerce And Has Sold Gas Pursuant To That Certificate, The Lessors May Not Abandon The Service Of Supplying The Gas After Expiration Of The Lease Without The Authorization Of The Federal Power Commission.

A. The Natural Gas Act Prohibits The Abandonment Of An Interstate Service In Natural Gas Without The Authorization Of The Federal Power Commission.

The fundamental purpose of the Natural Gas Act is to assure an adequate and continued supply of natural gas to the nation at reasonable rates. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147, 151-154; *CATCO, supra*, 360 U.S. at 388. As the court of appeals stated in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97, 101 (C.A. 10), reversed on other grounds, 353 U.S. 944:

> No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished.

To implement this purpose, Section 7 of the Act provides that no natural gas company may commence, maintain or terminate an interstate service in natural gas without the permission and approval of the Commission. Thus, no natural gas company "shall engage

in the transportation or sale of natural gas * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." Section 7(c), 15 U.S.C. 717f(c). Once an interstate service in natural gas has been properly authorized and undertaken pursuant to a Commission certificate under Section 7(e), 15 U.S.C. 717f(e), it may not be terminated without Commission authorization under Section 7(b), 15 U.S.C. 717f (b). The conditions under which abandonment may be authorized are set out in Section 7(b), which provides in pertinent part:

> No natural-gas company shall abandon * * * any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.[14]

The decision of the court of appeals is contrary to basic principles of Section 7 reflected in this Court's decisions, particularly *Sunray Mid-Continent Oil Co.*

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[14] This Court in *CATCO, supra*, 360 U.S. at 389, described the interplay of these provisions as follows:

> Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.

v. *Federal Power Commission*, *supra*, and *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170. In those cases the Court recognized that, in light of the purposes of the Act, the primary focus of Section 7 is on the *service* of supplying gas to the interstate market, and not on specific sales of gas or the property interests or contract rights of specific individuals with respect to gas.

In *Sunray*, *supra*, a producer of gas contracted to sell to an interstate pipeline a quantity of gas produced from its fields every year for twenty years. The producer then applied to the Commission for a certificate authorizing the sale for the period of twenty years. The Commission rejected the producer's application for a limited certificate and issued a certificate of unlimited duration. Reserving its right to object to the unlimited certificate on review, the producer commenced deliveries under the contract.

On review, this Court upheld the Commission's authority to issue an unlimited certificate. Moreover, the Court stated (364 U.S. at 155):

> When [the contract] expires, petitioner * * * will be under an obligation to continue to deliver gas to [the pipeline] on the latter's request unless it can justify an abandonment before the Commission * * *. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act.

The Court based its decision on the distinction in Section 7 between specific sales of gas and the "service" of supplying gas to interstate markets (364 U.S. at 149-151):

> [U]nder § 7(e) the Commission is authorized to issue a certificate authorizing the "service" covered by the application, as well as a "sale" * * *.
> * * * Thus, it is evident that all the matters for which a certificate is required * * * must be justified in terms of a "service" to which they relate. Accordingly, § 7(e) itself gives positive indication that the "service" which the Commission's certificate may authorize is something quite apart from simply the specific sales which § 7(c) forbids without a certificate sufficient to authorize them.

The Court also recognized that the Commission's power to authorize the service of supplying gas to interstate markets beyond the term of a contract, and to require the continuation of that service notwithstanding changes in the parties' contractual rights to the gas, is essential to the purposes of the Act. The Court noted that if the Commission's authority were limited to granting certificates tied to the duration of contracts, producers would be free to make contractual arrangements which enabled them to cease an interstate supply at their pleasure and to avoid the rate-changing procedures of the Act; pipeline companies, moreover, would have comparable powers that might threaten local communities with economic ruin. 364 U.S. at 142-143.[15]

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[15] As the Court observed (364 U.S. at 142):

> If petitioner's contentions * * * were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and

In *Sun Oil, supra,* the Court applied the principles of *Sunray* to hold that the Commission's order issuing a large number of certificates (including the Gulf certificate in this case) [16] was not limited to the contract period described in the application, but authorized and required the applicant to supply the proposed service (*i.e.*, sales of gas from the sources designated in the application to the customer designated in the application) for an unlimited period. In short, *Sunray* and *Sun Oil* establish that once the service of supplying gas in interstate commerce has been authorized and has commenced,[17] " 'there can be no withdrawal of that supply from continued interstate movement without Commission approval' "

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thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market.

[16] The order granting Gulf's certificate (A. 23-40), which was before this Court in *Sun Oil*, was an omnibus order granting more than 100 identical certificates of public convenience and necessity, the terms of which the Court set out at 364 U.S. at 172, n. 2. Noting that "the certificate issued makes no reference to any limitation of time," the Court stated, "we would hardly see any basis for overturning the Commission's view that no limitation as to time was implied" (364 U.S. at 175).

[17] It is settled that this commitment, once made, is binding on those who later come into possession of the mineral estate. As the court of appeals stated in *Hunt* v. *Federal Power Commission*, 306 F.2d 334, 342 (C.A. 5), "[l]ike the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under § 7(b) * * *" (citations omitted). See also *Mitchell Energy Corp.* v. *Federal Power Commission*, 533 F.2d 258 (C.A. 5).

(*Sunray, supra,* 364 U.S. at 156, quoting from *CATCO, supra,* 360 U.S. at 389). The service must continue until the supply is exhausted or until the Commission authorizes abandonment, even though the supplier may have no contract obligation to deliver the gas and the customer no contract right to receive it, and even though the supplier's application was limited to a finite quantity of gas over time.[18]

Those principles apply fully to this case. It is not disputed that Gulf properly undertook an interstate service in natural gas from its leaseholds, which service was authorized by certificates from the Commission that contained no time limitation. Gulf clearly had the authority under its leases to develop and sell the gas to interstate purchasers.[19] Under the Act

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[18] The Commission may, of course, issue certificates limited to a specific period of time or to finite quantities of gas over time. *Federal Power Commission* v. *Moss,* 424 U.S. 494. But *Sunray* and *Sun Oil* established that unless otherwise limited in the certificate, the service that a certificate authorizes is the supply of gas in the manner proposed in the application or in the contract referred to in the application, and that the service must continue until the source is exhausted or the Commission authorizes abandonment, even though the contract contemplated a finite term and thus the delivery of a finite quantity of gas.

[19] Indeed, as the Commission suggested (A. 713), Gulf had the duty under the leases to do so, since, as this Court recognized in *CATCO, supra,* 360 U.S. at 394, at the time of Gulf's contracts with El Paso and Phillips the interstate market was the principal available market for natural gas.

A gas lease contains an implied covenant to develop and market the gas. *Weymouth* v. *Colorado Interstate Gas Co.,*

as construed in *Sunray* and *Sun Oil*, that service must continue until the Commission permits its cessation, even though Gulf's leases have terminated and the present suppliers are the holders of the reversionary interest in the gas.

For the purposes of the Act, it is immaterial that rights and interests have changed as a result of the expiration of a lease rather than a contract. The rationale and result of *Sunray* and *Sun Oil* would not have been different if the producers had undertaken to supply gas to interstate customers for a fixed term by means of lease arrangements instead of sales contracts.[20] The proposition that the expiration of a lease terminates the obligation to continue certificated service would frustrate the purposes of

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367 F.2d 84 (C.A. 5). See also *Cole Petroleum Co.* v. *United States Gas & Oil Co.*, 41 S.W. 2d 414 (Tex. Sup. Ct.); 5 Williams & Meyers, *Oil and Gas Law*, pp. 388, *et seq.* (1975).

[20] That very situation was presented in *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392. Producers of gas had long-term sales contracts with a pipeline, which contracts, after the *Phillips* decision, came under the Commission's jurisdiction over the "sale" of gas in interstate commerce. Section 1(b), 15 U.S.C. 717(b). The parties then withdrew their sales contracts and substituted an arrangement whereby the pipeline acquired the producers' leasehold interests, the producers (or one of them) continued to operate the production, and the producers were compensated largely on the same basis as before. Although the result of the transaction may not have constituted "sales" of gas under state law, this Court held that the Commission had jurisdiction over the transaction, stating (381 U.S. at 400): "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."

the Act to the same extent and for the same reason as the contentions rejected in *Sunray* and *Sun Oil*. Producers and pipelines would be able to limit their service obligations under the Act, to evade rate regulation, and to disrupt the interstate supply of gas by conducting business through short-term lease arrangements—or through leases terminable at will or on specified conditions, such as rises in intrastate gas prices. In either the lease or the contract situation, the obligation to continue certificated service is not "one imposed by [private agreement] but by the Act." *Sunray, supra*, 364 U.S. at 155.[21]

Respondents and the court below have attempted to distinguish *Sunray* and *Sun Oil* on the basis of the Court's observation in *Sunray* that the applicant there was free to "avail itself of its undoubted right to stand firm on its own application, and reject the proffered certificate" (364 U.S. at 141) (and

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[21] Similarly, it makes no difference that the lessors may not have anticipated that the lessee's sales might subject the lessors to an obligation to continue interstate service. In *Sun Oil*, for example, the petitioner did not anticipate when he signed a ten-year sales contract in 1947 that this Court in 1954 would interpret the Act as requiring him to obtain a certificate to sell his gas and that the certificate he obtained would require him to continue that service after the contract term. Moreover, as the courts have recognized in the context of railroad leases (see discussion at pp. 21-27, *infra*), the passage of the Natural Gas Act found the production and sale of natural gas under a variety of lease and contract arrangements and simply added regulatory conditions to the operation and termination of such arrangements. That such conditions may have been unanticipated does not lessen their force and effect. See also note 22, *infra*.

thus, presumably, to decline to sell its gas to interstate purchasers). In contrast, it is asserted, the lessors here were powerless to prevent Gulf, the lessee, from obtaining its certificates and dedicating the gas by its interstate sales. (See Respondents' Br. in Opp., p. 8; Pet. App. 8a-9a.)

The distinction is untenable. First, it is by no means clear that the lessors were powerless to prevent Gulf from dedicating the leasehold gas to interstate commerce or from obtaining a certificate for that purpose. As the Commission noted, the lessors could have intervened in the certification proceeding to assert their interests in the gas or otherwise resist the certificate, but they did not do so. Nor does the record indicate that the lessors made any protest to Gulf, or took any other action to prevent the interstate sale of the leasehold gas. Instead, as the Commission noted, the lessors were apparently satisfied with the sales to El Paso and accepted royalties from those sales.

Second, a person's obligation to continue interstate service under the Natural Gas Act does not depend on his having had an opportunity to decline the certificate authorizing the service or to elect not to sell the dedicated gas in interstate commerce. The Commission has long established that a successor in interest to gas producing fields (*e.g.*, a purchaser of fee interests or a purchaser of leaseholds) is bound by the interstate dedication of his predecessor in interest even though the successor never had an opportunity to decide against the dedication. *Cumberland Natural*

Gas Co., 34 FPC 132; *Blair Vreeland*, 53 FPC 843. So far as the purposes of the Natural Gas Act are concerned, it should be immaterial whether the successor's interest is that of an assignee, a purchaser, or a reversioner under a terminated lease.[22]

B. *Decisions Of This Court Under The Interstate Commerce Act Further Support The Commission's Determination That Respondents May Not Withdraw Their Gas From The Interstate Market Without Commission Approval.*

The holding of the court of appeals is contrary to the long settled construction by this Court and the Interstate Commerce Commission (ICC) of the parallel abandonment provisions of the Interstate Commerce Act. Section 7(b) of the Natural Gas Act follows Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), which was added to the Interstate

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[22] It is true that a purchaser or assignee (unlike a reversioner) may be said to be on notice of the interstate dedication when he chooses to acquire his interest, but decisions of this Court have made it clear that the purposes of the Natural Gas Act supersede the expectations of private parties, and that the regulatory consequences of the Act do not depend on these expectations. Thus, as noted, the parties in *Sunray* and *Sun Oil* did not expect, when they entered into fixed term sales contracts, that the Natural Gas Act would require the sellers to continue service beyond the terms of the contracts. For the same conclusion with respect to railroads, see pp. 25-26, *infra*.

In addition, the holders of the reversionary interests here are, in substantial part, not the original lessors but persons and companies who acquired their interests after the leases were in effect. See notes 4 and 5, *supra*.

Commerce Act by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478.[23]

Thus in *Smith* v. *Hoboken Railroad Co.*, 328 U.S. 123, the lessor, who had leased railroad property to a railroad in 1906, sought to terminate the lease pursuant to its terms and take over operation of the road. Even though the lessor was willing to assume operations, this Court held that the lessor could not terminate the lease because termination would constitute abandonment of operations by the lessee, and "a certificate [of abandonment from the ICC] is

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[23] 49 U.S.C. 1(18) provides in pertinent part:

> * * * [N]o carried by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *

Respondents' contention (Br. in Opp., pp. 9-10, n. 21) that the abandonment provisions of the two statutes are not parallel is without merit. While respondents assert that there are "[s]ubstantial differences between regulation of railroad service and regulation of interstate sales of natural gas" (*ibid.*), they have not identified any such differences, and we can perceive none that are material to this case. Both statutes are inapplicable to wholly intrastate commerce and both statutes were designed to protect the national interest in continued interstate service at just and reasonable rates. As this Court stated in *Sunray*, *supra*, 364 U.S. at 141-142 and n. 9, these two statutes, Section 1(18) of the Interstate Commerce Act and Section 7(b) of the Natural Gas Act, represent "a common pattern in federal utility regulation in forbidding such abandonment 'without the permission and approval of the Commission first had and obtained.'"

required under § 1(18) whether the lessee or the lessor is abandoning operations." 328 U.S. at 130. Similarly, in *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134, the lessor of certain trackage rights sought to terminate the lessee's use of the tracks pursuant to the terms of the lease (which provided for termination at will on twelve months' notice). This Court held that the lessee's trackage rights could not be terminated without the ICC's permission under Section 1(18). The Court noted that, as was the case in *Smith* v. *Hoboken Railroad Co.*, "the fact that the trackage contract was entered into * * * prior to the passage of [Section 1(18)] is immaterial; the provisions of the Act, including § 1 (18), are applicable to contracts made before as well as after its enactment." 328 U.S. at 144. With particular relevance here, the Court also stated (328 U.S. at 147):

> There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue.[24]

[24] While the lessees in both *Smith* v. *Hoboken Railroad Co.* and *Thompson* v. *Texas Mexican Railway Co.* were railroads in reorganization under Section 77 of the Bankruptcy Act, 47 Stat. 1474, as amended, 11 U.S.C. 205, the Court gave no indication that that fact limited the general validity of the propositions stated, and there is no reason why it should. Thus the Court's statement that "[w]hether the public interest requires that the line be operated by the lessee rather

Those decisions of this Court relied on and confirmed earlier decisions of the ICC. Thus in *Chicago & Alton Railroad Co.* v. *Toledo, Peoria & Western Railway Co.*, 146 ICC 171 (cited with approval in *Thompson* v. *Texas Mexican Railway Co., supra*, 328 U.S. at 144), the Chicago & Alton Railroad had leased from the Toledo, Peoria & Western Railway (Toledo), before the enactment of Section 1(18), joint use of a certain portion of Toledo's track. The lease was terminable on twelve months' notice, and in 1927 the successor to Toledo gave such notice. The Chicago & Alton then filed a complaint with the ICC alleging that the public interest required continuance of its service. The ICC agreed despite the terms of the lease. First, it ruled that termination of operations under lease was within the abandonment provisions of its statute (146 ICC at 180-181):

> Although there is no express reference in these provisions to the * * * withdrawal of operations under lease, it seems clear that such * * * withdrawal is within the intended scope of the statute. The public interest in transportation lies primarily in the operation of railroads rather than in the facilities themselves. Operation under lease may comprise the entire operation of a line or any portion of such operation, and the public interest therein is obvious, the extent varying with the circumstances. * * * In our opinion we have jurisdiction over the abandon-

than the lessor presents a question for the Commission under § 1(18) * * *" (328 U.S. at 130) is true whether the lessee is in reorganization or simply a party to an expired lease.

> ment of the "operation" of a railroad under a trackage agreement * * *.

The ICC then addressed the contention that the lessor had a right to terminate the lease under local law (146 ICC at 181):

> It may be contended, however, that the parties have a legal right to rely upon the terms of their contract. Such a contention can not be sustained. The statute, upon its enactment, found railways in operation under various conditions, including, as in this case, operation under lease, by agreement between the owner and the user of facilities. The statute, in effect, added a new condition to the provisions for termination of such arrangements, namely, the condition that no abandonment of the operation in interstate or foreign commerce might occur without our approval.

The ICC recognized the very danger, suggested by this case, of manipulation of Commission jurisdiction by restructuring leases (*ibid.*):

> If our jurisdiction * * * is to be limited or circumscribed by the specific provisions of the contract and is only exercisable during the life of the contract as stated on its face, it could be entirely defeated by short-term contracts made renewable at the option of the parties.

See also *Chicago & North Western Railway Co.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 502 F. 2d 193 (C.A. 7).

In an even more closely analogous case, the ICC refused to allow a lessor to abandon interstate rail

service upon the expiration of his lessee's 50-year fixed-term lease. The Commission reached this conclusion despite the lessor's claim that it was not subject to the Commission's jurisdiction because it had ceased to be an operating railroad prior to the passage of the Interstate Commerce Act in 1887. *Lehigh Valley Railroad Company Proposed Abandonment of Operation*, 202 ICC 659.

The principle of these cases is evident: The enactment by Congress of the Transportation Act of 1920 encumbered all interstate railway operations, including operations undertaken under lease, with the requirement that such service could not be abandoned without ICC authorization. Similarly, the enactment of the Natural Gas Act, as construed in *Phillips*, imposed the requirement that no interstate service in natural gas, including service based on leased reserves, could be terminated without abandonment authorization from the Federal Power Commission under Section 7(b) of the Act.

Respondents contend that the foregoing cases involved lessors who were themselves railroad carriers subject to the ICC's jurisdiction under the Interstate Commerce Act; relying on *Meyers* v. *Famous Realty, Inc.*, 271 F. 2d 811 (C.A. 2), certiorari denied, 362 U.S. 910, they argue that a certificate of abandonment is not required when a lessor who is not a railroad subject to the ICC's jurisdiction comes into possession at the termination of a lease. Respondents' Br. in Opp., p. 10. They argue further that, as simple lessor-landowners, they are not "natural gas

companies" subject to the Natural Gas Act (citing *Mobil Oil Corp.* v. *Federal Power Commission*, 463 F. 2d 256 (C.A. D.C.), certiorari denied, 406 U.S. 976), and that abandonment authority accordingly is not required when they come into their reversionary interests (Br. in Opp., p. 11). Those arguments are erroneous.

First, *Meyers* is inapposite. In that case a lessee railroad, Jay Street, leased railroad properties from a partnership in 1941 and operated them. In 1945 the defendants, Famous Realty, Inc. and its distributees, acquired all the properties of both the lessee and lessor, and thus stood in the shoes of both. In 1959 the ICC granted Jay Street a certificate of abandonment—a fact respondents fail to note—and it was in those circumstances that the court held that Famous Realty, as a lessor, was not required to obtain a certificate to terminate operations.[15] That holding is entirely consistent with the Commission's holding here (A. 611) that Gulf, the lessee, despite the expiration of the lease, would be required to obtain abandonment authorization before abandoning sales from the Crane County acreage. See p. 8 and note 11, *supra*. The principle of the railroad cases, including *Meyers*, is that, once railroad operations are commenced under lease, the service may not be terminated unless some party, either the lessor or the

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[15] *City of New York* v. *United States*, 337 F. Supp. 150 (E.D. N.Y.), also cited by respondents (Br. in Opp., p. 10, n. 24), is inapposite for the same reason; there too the lessee railroad obtained abandonment authority from the ICC.

lessee, obtains abandonment authorization from the regulatory authority.[26]

Second, respondents' apparent contention that a successor in interest to gas producing property who was not formerly a natural gas company within the meaning of Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), is not within the Commission's jurisdiction and thus does not need permission to cease interstate sales would eviscerate the Natural Gas Act. It would mean that a real estate developer succeeding in interest (by purchase, inheritance, or any other means) to gas fields vital to the nation's interest could, without Commission approval, shut down production and build a shopping center. Applied to the Interstate Commerce Act the proposition would be equally devastating.[27]

Finally, respondents' reliance on *Mobil Oil Corp.*, *supra*, is unfounded. There the court held only that

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[26] Moreover, respondents' contention that the railroad cases impose a service obligation only on lessors who were carriers subject to ICC jurisdiction ignores the *Lehigh Valley Railroad* case, *supra*, in which, as noted at p. 26, *supra*, the lessor was required to operate the road notwithstanding its claim that it had ceased to be a carrier before the enactment of the Interstate Commerce Act.

[27] In any event, respondents' attempt to depict themselves as landowners who "merely lease[d] [their] properties to a 'natural gas company'" (Br. in Opp., p. 11) and who are thus presumably incapable of assuming their lessee's interstate operations is unpersuasive on the facts of this case. Respondents (Southland, Exxon, Texaco *et al.*) fully intend to continue selling their gas; they merely want to sell it on the intrastate market. See also note 22, *supra*.

lessors, having solely royalty interests in their lessees' operations, were not natural gas companies within the Commission's jurisdiction, at least for purposes of regulating the royalty agreements. The court did not consider whether, on termination of the leases, such former lessors who succeed to the interest of their natural gas company lessees would be natural gas companies within the meaning of the Act, or whether they could terminate interstate sales. *Mobil Oil Corp.* does not apply to *former* lessors like respondents, and there is no reason under the Natural Gas Act to treat a party who succeeds to the interests of a natural gas company by reversion differently from a party who succeeds to such interests by any other means.

C. *The Decision Of The Court Of Appeals Would Severely Impair The Commission's Regulatory Authority.*

The decision of the court below, in permitting lessors to terminate interstate services in natural gas without Commission authorization, would seriously undercut the Commission's ability to assure an adequate and reliable supply of natural gas to the nation. Immediately, the decision would free billions of cubic feet of natural gas reserves from their interstate dedication. Gulf has been selling interstate to El Paso approximately 25 million cubic feet per day of gas attributable to the Waddell Lease (A. 403) and 18 million cubic feet per day of gas attributable to the Goldsmith Lease (A. 409). In addition, continued dedication of the reserves under-

lying numerous other fixed-term leases that expired in 1976 depends on the result of this case.[18]

Further, it makes little difference that the leases in question here were fixed-term leases while many leases today are life-of-the-well leases. While respondents have argued that fixed-term leases of the kind involved here are no longer common (Br. in Opp., p. 11), the rationale of the court below would apply to leases that are terminated for any reason pursuant to their terms. The decision thus creates a substantial incentive for lessors and producers to draft their leases in ways permitting termination when market conditions make it advantageous.[19]

Indeed, the court below has recently interpreted its decision in this case as applying to life-of-the-well leases terminable on certain conditions. *Pennzoil Pro-*

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[18] The following cases are pending in the Fifth Circuit awaiting the outcome of this case: *Dore Corp. and Sullivan-Wells Co.* v. *Federal Power Commission*, No. 76-2428, *Ft. Worth National Bank, et al.* v. *Federal Power Commission*, No. 76-2808, *Briercrest Oil Co.* v. *Federal Power Commission*, No. 76-2828 (appeals of FPC orders dated March 12, 1976, March 24, 1976, and May 7, 1976); *Dore Corp. and Sullivan-Wells Co.* v. *Federal Power Commission*, No. 76-4093, *Briercrest Oil Co.* v. *Federal Power Commission*, No. 76-4169 (appeals of FPC orders dated September 8, 1976, and October 27, 1976); and *Ft. Worth National Bank, et al.* v. *Federal Power Commission*, No. 76-3785 (appeal of FPC orders dated July 6, 1976, and September 3, 1976).

[19] While respondents have argued that it would not be in a lessee/producer's economic interest to enter into short-term leases (Br. in Opp., p. 13), it would not be difficult to devise lease arrangements that maximized both parties' options to leave the interstate market when this served their mutual advantage.

ducing Company v. *Federal Power Commission*, 553 F. 2d 485 (C.A. 5), rehearing denied, September 1, 1977 (see note 31, *infra*). In that case Pennzoil and Shell, producers selling gas in interstate commerce under life-of-the-well leases, sought special relief from Commission ceiling rates in order to pay to their lessor royalties which, by the terms of the leases, were to be based on the intrastate "market value" of the leasehold gas. The leases contained standard provisions for termination in the event royalties were not paid as required. When the producers cited the threat of cancelled leases and consequent diversion of gas from the interstate market, the Commission replied that "[i]f the leases were cancelled and [the lessor] were to undertake to sell the subject gas, [the lessor] would simply assume the obligations of Pennzoil and Shell to continue service to [the interstate pipeline]." [30] The Commission then rejected the lessees' request to raise their interstate rates because of their higher royalty payments and also their alternative request to pay the lessor royalties in kind, that is, in gas which the lessor could sell on the intrastate market. The court, reversing the Commission, said (553 F. 2d at 489):

> Thus the Commission was under the impression that [the lessor's] gas was trapped in the interstate market, whether or not the leases were terminated.

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[30] Opinion No. 753, *Pennzoil Producing Co., et al.*, issued January 30, 1976, p. 9.

Citing its decision in the instant case, the court declared that "the Commission was acting under the wrong legal premise" (*ibid.*), and remanded to the Commission "for reconsideration in light of *Southland Royalty*" (*ibid.*).[31]

The court of appeals in *Pennzoil* thus appears to have construed its decision in this case in a way that would permit any gas sold in interstate commerce pursuant to Commission certificates to be withdrawn from that service without Commission approval on the

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[31] The court also concluded that since in its view cancellation of the leases would permit the lessor to withdraw the entire supply from the interstate market,

> [i]t may well be that the "present or future public convenience or necessity" will suggest [to the Commission] the propriety of abandoning a fraction of the gas in [the lessor's] property [by allowing the lessees to pay royalties in kind], rather than lose the entire amount from the interstate market. [553 F. 2d at 489.]

The Commission petitioned for rehearing for the limited purpose of requesting the court to delete all reference to the instant case and to the lessor's supposed right to withdraw gas from the interstate market upon termination of the leases, since there were alternative grounds for the decision and since the instant case is currently pending this Court's review. The court recently granted the petition in part by deleting the language set forth in this note, on the ground that it was premature to indicate what the Commission might conclude on remand. *Per curiam* opinion denying petition for rehearing, September 1, 1977, attached hereto as Appendix B, *infra*, pp. 4a-5a. But the modified opinion continues to make clear that in the court's view the lessor is free to withdraw the gas when and if he terminates the lease.

occurrence of an event that terminates the lease.[32] *Pennzoil* casts in bold relief the court's fundamental error here of confining certificated public service obligations by the terms of private leases. The court was wrong in rejecting the Commission's basic premise that once gas flows in interstate commerce pursuant to a properly obtained Commission certificate, there may be no termination of service until the dedicated reserves are exhausted or the Commission authorizes abandonment. As *Pennzoil* indicates, the effect of the decision below is potentially very broad. Unless that decision is overturned, the concept of dedication of service, which this Court has recognized and defined in past cases and which is essential to the purposes of the Natural Gas Act, will be undermined.

D. *The Decision Of The Commission In This Case Is Not Inequitable With Respect To The Reversioners.*

Contrary to the apparent view of the court of appeals, there is nothing inequitable about the Commission's position, and certainly not on the facts of this case. As we have noted, Gulf, as lessee of a mineral

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[32] In another case now pending in the Fifth Circuit, gas from several leases had been dedicated to interstate service and gas from some of the leases had begun to flow in interstate commerce but the other leases had been allowed to lapse. Citing the court's decision in this case, the lessors and subsequent lessees of the acreage have claimed that the dedication of the reserves under the lapsed leases automatically terminated. *Northern Natural Gas Co.* v. *John L. Crawford*, Docket No. CS71-6 (issued September 29, 1976), appeal docketed *sub nom. Harrison* v. *Federal Power Commission*, C.A. 5, No. 76-4318, December 19, 1976.

interest, had an implied obligation to its lessors to develop and market the gas underlying the leaseholds in order to permit the lessors to earn their royalties (see note 19, *supra*, and accompanying text). In the early 1950's the interstate market was the principal market for such large quantities of gas (*CATCO*, *supra*, 360 U.S. at 394). Gulf entered the interstate market in fulfillment of its lease obligations and for the benefit of its lessors. As the Commission noted (A. 713, n. 3), "the lease owners apparently had no objection to interstate dedication, for they accepted royalties from such sales."[33] Having authorized and benefited from their lessee's interstate sales of leasehold gas, the reversionary mineral owners have no equitable basis for claiming that they should not be bound by the regulatory consequences of those sales.

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[33] It is not unreasonable or inappropriate to assume that the reversionary mineral owners, had they been in possession at the time, would have made the same interstate sales. See also note 22, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1977.

APPENDIX A

The Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part:

Section 1(b):

The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [15 U.S.C. 717(b)]

Section 7(b):

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [15 U.S.C. 717f(b)]

Section 7(c):

No natural-gas company or person which will be a natural-gas company upon completion of

any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [15 U.S.C. 717f(c)]

Section 7(e):

Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. 717f(e)]

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 76-1626, 76-1831, 76-2128

PENNZOIL PRODUCING COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

Sept. 1, 1977

Petitions for Review of an Order of
Federal Power Commission

(Texas Cases)

ON PETITION FOR REHEARING

(Opinion June 6, 1977, 5 Cir., 1977, 553 F.2d 485)

Before CLARK, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

In its petition for rehearing, the Federal Power Commission asserts that language in the opinion may erroneously indicate the prejudgment of an issue not before the Court, *i.e.*, the effect of our decision in *Southland Royalty Co.* v. *FPC*, 543 F.2d 1134 (5th Cir. 1976) on a state court termination of a lease, particularly one not limited by a fixed-term.

In order to pull from the opinion any indication as to how *Southland* might apply to the facts of this

case, we delete from our opinion the last two sentences found at the end of the final paragraph, which read as follows:

> It may well be that the "present or future public convenience or necessity" will suggest the propriety of abandoning a fraction of the gas in Williams' property, rather than lose the entire amount from the interstate market. This decision is for the Commission.

We agree with the Commission that the statement was premature, if construed to be decisional, and unnecessary with respect to our decision.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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